Supreme Court, U.S.
FILED

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No.

IN THE

# Supreme Court of the United States

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MARILYN M. MOSS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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**PETITION FOR A WRIT OF CERTIORARI**

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MARILYN M. MOSS
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28 pp

## QUESTIONS PRESENTED

1. Whether or not "materiality" is an essential element of bankruptcy fraud statute 18 U.S.C. Section 152(3).

2. Whether or not district court lacks subject matter jurisdiction when the grand jury omitted the essential element of "materiality" in the Indictment and whether Petitioner's trial counsel was ineffective for failing to object.

3. Whether guilty plea based on insufficient indictment lacking essential element is unconstitutional and conviction should be vacated.

4. Whether imposing term of supervised release on pretrial detainee who was never been "imprisoned" or under jurisdiction of "Bureau of Prisons" violates congressional intent.

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# In the Supreme Court of the United States

No. 00-3917

MARILYN M. MOSS

*v.*

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

The Defendant, on her own behalf, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (Appendix, *infra*, 1a-4a ) does not have a citation.

## JURISDICTION

The initial judgment of the court of appeals was entered on July 26, 2001. The judgment of the court of appeals on rehearing was entered on October 1, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

*Sixth Amendment*

In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation; . . .and to have the Assistance of Counsel for his defense.

*Fifth Amendment*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . .nor be deprived of life, liberty, or property, without due process of law.

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## RULES INVOLVED

*18 U.S.C. §152(3)*

A person who (3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, or in relation to any case under title 11 shall be fined under this title, imprisoned not more than 5 years or both.

*Federal Rule of Criminal Procedure 7(c)(1)*

*In General.* The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . .

*U.S.S.G. §5D.1.1(a), (b)*

(a) The court shall order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than **one year** is imposed, or when required by statute.

(b) The court may order a term of supervised release to follow **imprisonment** in any other case. (*emphasis added)*

*18 U.S.C. §3624(e)*
*Supervision After Release*
A **prisoner** whose sentence includes a term of supervised release after **imprisonment** shall be released by the **Bureau of Prisons** to the supervision of a probation officer. *(emphasis added)* .

## STATEMENT

After being in Pretrial Detention for 15 ½ months and following a denial of her third Motion For Pretrial Release on June 7, 2000, Petitioner entered a plea of guilty to Count I of the indictment for filing a false pleading in a bankruptcy case in violation of 18 U.S.C. §152(3). Count II of the indictment was dismissed. On June 8, 2000, the date of the plea, Petitioner was released on pretrial bond. On November 8, 2000, Petitioner was sentenced to the maximum of 6 months imprisonment and a term of two years supervised release.[1] Six of the 15 ½ months of pretrial detainment were applied to the 6 month sentence and no credit was given for 9 ½ months pretrial detainment.

For a statement to be "material" in a charge of bankruptcy fraud under 18 U.S.C. §152(3), it: "must be pertinent to the nature and extent of the bankrupt's assets, matters pertinent to his financial transactions and statements designed to secure adjudication by a

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1 After being released on June 8, 2000, Petitioner learned from reviewing the Eighth Circuit Pattern Criminal Jury Instruction No. 6.18.152B that for statements to constitute a crime, they have to be "material." Petitioner's counsel, who was paid $17,500 in cash by Petitioner's 86 year old mother who could not afford it, was so ineffective he did not even bother to look up the elements of Petitioner's alleged crime. Petitioner, on her own behalf, filed a Presentence Memorandum and Motion To Dismiss which was denied at the sentencing hearing.

particular bankruptcy court." *United States v. Yagow,* 953 F.2d 427, 432 n. 2 (8th Cir.), *cert. denied*, 506 U.S. 833 (1992)

Petitioner suggests that none of the statements in Count I of the Indictment are material. The statements are:

> ". . .she had been diagnosed with multiple sclerosis, that in the past five years she had been bedridden and unable to control her bowels or bladder, that she had lost the use of her legs, that her vocal cords were useless and she had difficulty speaking. . ."

For making these harmless[2] statements, Petitioner, now a 54-year old "felon" cannot get a decent job because of the criminal record, has been unlawfully deprived of her property because of the illegal seizure and has been traumatized by the unnecessary and inhumane treatment by the government. The government's prejudicial omission of the "materiality element" in the indictment deprived Petitioner of knowledge that the statements must be "material" for a crime to exist. The omission violates Petitioner's Fifth and Sixth Amendment rights and deprive the District Court of subject matter jurisdiction.. There would have been no plea nor any conviction if the "materiality" element had been included in the Indictment.

And finally, Petitioner suggests that if the Grand Jury had been told the statements must be "material," no Indictment would have been handed down. Any reasonable person understands that symptoms of physical illness are not "material" to the financial issues a bankruptcy case as described by the *Yagow* Court.

The Court of Appeals for the Eighth Circuit affirmed Petitioner's conviction and sentence.

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2 In their investigation, the U.S. Probation Department determined and stated in their Presentence Investigation Report that there were no victims and no damages as a result of Petitioner's alleged false statements.

1. *Background/California Civil Action.* The incidents which lead up to the criminal matter arose from a civil California attorney-client fee dispute concerning the California case entitled *Moss v. Santa Fe Railroad* CV89-5909KN(ex) resolved in 1992. In a nutshell, after abandoning Petitioner and her California employment law case in 1990, Petitioner's former attorneys have sought to obtain over $600,000 in attorney fees they never earned.[3] Petitioner's former attorneys engaged in an *ex parte* arbitration in California which Petitioner was not informed of date or time and presented fraudulent information to the arbitrators to obtain their $600,000 award. That has been the basis of numerous the former attorneys have filed against Petitioner and her subsequent *Moss v. Santa Fe* attorney since 1992. It continues to go on now.

After Petitioner erroneously filed the Missouri bankruptcy case in 1998, the former attorney's counsel instigated Petitioner's unlawful arrest as part of their strategy to obtain Petitioner's 1992 personal injury proceeds.

2. *The Missouri Bankruptcy Case.* The *In re Moss* bankruptcy case was erroneously commenced on August 6, 1998. There is only one alleged creditor, whose Proof of Claim is disputed and that matter is now pending before the Eighth Circuit Court of Appeals. *Moss v. Burton & Norris* 01-3909. A Proof of Claim in a bankruptcy case is decided under nonbankruptcy laws. *In re Oriental Rug Warehouse Club, Inc.* 205 B.R. 407 (8th Cir. 1997) citing *United States v. Sanford*

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3 Under California laws, attorneys holding a contingency fee retainer agreement are not entitled to any attorney fees if they withdraw from a case because they believe it is worthless. *Estate of Falco* 188 Cal.App.3d 1004 (1987). To insure the understanding was correct Petitioner's former attorneys signed a lien release agreement. But, two years later after the *Moss v. Santa Fe* case went to trial and Petitioner won, the original defaulting attorneys sued Petitioner for over $600,000.

979 F.2d 1511, 1513 (11th Cir. 1992); 11 U.S.C. §502(b)(1) Under nonbankruptcy laws, the 1993 California claim is not enforceable against Petitioner, who has been an Arizona domicile since 1997. Additionally, under nonbankruptcy laws, both Missouri and California courts lack personal jurisdiction over an Arizona domicile and the California claim has never been registered in Missouri nor Arizona as required by the laws of those states.. And finally, the California claim is not enforceable in California according to California exemption and lien laws, which means that under nonbankruptcy laws, the California claim may not be given Full Faith and Credit by any other district.

3. *The Criminal Case.* On February 24, 1999, no criminal complaint had been filed and no warrants issued. Petitioner Marilyn Moss, age 52 at the time, had never been arrested in her life. Petitioner had not so much as a parking ticket on her record. Nevertheless, on verbal instruction by Missouri FBI agent, the Ottawa, KS police arrested Petitioner in the backseat of her Mother's car and took her to the Ottawa, KS jail.[4] There Petitioner was held for over four hours, deprived of making any phone calls to talk to an attorney, refused to learn why she had been arrested and was deprived of food or water. Petitioner was then turned over to the Missouri FBI agents who, over Petitioner's objections, transported Petitioner across state lines without giving Petitioner any opportunity to consult with

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4 Under the case of *Ex Parte Swift* 275 Federal Reporter 57 (E.D.Mo. 1922), a United States District Attorney is without color of authority to verbally order a state employee to arrest a person without a warrant for alleged violation of federal statute. Arrest without a warrant is governed by law of the state where the arrest takes place. *U.S. v. Watson,* 423 U.S. 411, 420 n.8 (1976) see also *U.S. v. DiRe* 332 U.S. 581 (1948).

an attorney or have an extradition hearing.[5] In transit, Petitioner was handcuffed behind her back in a very painful manner causing her wrists to be cut by the handcuffs. At the FBI office in Missouri, Petitioner was repeatedly threatened and was handcuffed to a bar on the wall and told if she did not sign documents they put in front of her, she would be left there indefinitely. Petitioner was then taken to a Clay County jail and housed in inhumane conditions. Petitioner had no food or water for over 24 hours after the unlawful arrest.

A Criminal Complaint was filed the following day, February 25, 1999 and alleged Petitioner had filed two false papers with the Missouri bankruptcy court. Subsequently on March 2, 1999, Petitioner was indicted, without any opportunity to testify before the Grand Jury, on two counts of filing two false pleadings in the Missouri bankruptcy court. By omitting unlawful conditions of arrest from the search warrant affidavits, Missouri FBI agents obtained Kansas search warrants. On April 14, 1999, the Criminal Complaint was dismissed. Petitioner was denied bond on March 2, 1999, April 20, 1999 on motion for reconsideration and a third time on June 7, 2000.

On April 16, 1999, Petitioner's counsel filed a "Motion for

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5 Under Kansas Revised Statute Sect. 22-2714, Federal Rule of Criminal Procedure 5 and 18 U.S.C. Section 3041, a citizen arrested without a warrant is entitled to be taken before a magistrate in the district in which they are arrested immediately. Petitioner was arrested at 11 a.m. on a week day and could have easily been taken to a Kansas magistrate and be given a hearing. Under Federal Rule of Criminal Procedure 20, a citizen is entitled to an extradition hearing before being transported over state lines. Under Kansas Statute 22-2703, the governor will not recognize the taking of a person from Kansas without a warrant or other writing evidencing the alleged crime. The Missouri officials were in violation of federal and state laws in this matter.

Judicial Determination of Defendant's Mental Competency." On May 3, 1999, Petitioner was flown to Oklahoma City transfer prison to await further transportation to Federal Medical Center Carswell, Ft. Worth, TX. Conditions at Oklahoma City and Ft. Worth were inhumane. Petitioner, a pretrial detainee, never arrested in her life, was locked down in a cold, filthy cell 23 hours a day and kept in solitary confinement for seven days. The food was unfit to eat and Petitioner, who has a naturally thin frame to begin with, lost twelve pounds in that one week. In solitary confinement at Oklahoma City, the guards and "doctors" who are supposed to furnish detainees with medications do not do so resulting in the detainees hallucinating, screaming and yelling 24 hours a day, seven days a week. Detainees in the solitary confinement unit bang on the metal shower walls with their feet and scream at the top of their lungs all hours of the day and night. It was a horrifying experience.

The treatment at Federal Medical Center, Carswell was even worse. There, Petitioner, a pretrial detainee, who has never been convicted was forcibly drugged and interrogated about her case. Petitioner was deathly ill from being forcibly drugged with medications to which she is allergic. The shock of the arrest and the inhumane conditions of confinement by the government has caused unwarranted trauma.

On June 7, 2000, after again being denied bond, Petitioner's attorney told her if she did not plead guilty to one count of filing a false paper that she would never see her 86 year old mother again and that they would not release her. Petitioner was threatened to be sent back to the inhumane conditions of Federal Medical Center, Carswell if she did not plead guilty to Count I of filing a false paper. On the other hand, if she plead guilty to one count, Petitioner was promised she would be released on bond and could see her Mother, whom she

had not seen for 15 ½ months. After being threatened by her own ineffective counsel, Petitioner believed she had no choice but to plead guilty to Count 1 of the indictment which she did. Petitioner was released that very day, June 8, 2000.

## REASONS PETITION SHOULD BE GRANTED

1. *Conflict of Circuits.* There is a conflict between circuits and a misunderstanding by the government in this case about whether or not "materiality" is an essential element to establish a *prima facie* case of bankruptcy fraud under 18 U.S.C. §152(3). With the increase in bankruptcy filings and the December 2 filing of the largest bankruptcy case in history (*In re Enron Corp.)*, Petitioner suggests that this is a perfect opportunity for this Court to resolve the conflicts about whether or not "materiality" is an essential element in bankruptcy fraud statutes and provide guidance to the circuits as to what subject matter is considered "material" in a bankruptcy case and what subject matter is "not material." For instance, in their Brief for Appellee, the government said the "materiality" element is not essential because in the 10th Circuit case of *United States v. Grey,* 56 F.3d 1219 (10th Cir. 1995) that court only gave due consideration to the issue after the Greys objected to the missing element.

Likewise in the Ninth Circuit case of *United States v. Lindholm* 24 F.3d 1078 (9th Cir. 1994), the government said the "materiality" element was not essential or if it was, the omission of it was harmless error.

In bankruptcy courts, the issue of whether or not a false statement is "material" is routinely considered for purposes of deciding if a debt is dischargeable under 11 U.S.C. §727.

Examples of "materiality" of false statements made in bankruptcy cases concerning discharge are:

(1) *In reSchroff* 156 B.R. 250, 256 (1993), the *Schroff* court found that: "transfer of CBR stock, failure to list the transfer and failure to list assets and liabilities" satisfy the "materiality" requirement to deny debtor discharge.

(2) *In re Buck* 166 B.R. 106 (Bkrtcy.M.D.Tenn.1993), the bankruptcy court held that while erroneous entries of particular assets on the bankruptcy petition are "material," that there is no evidence that there was any intend to defraud and that such entries were merely mistakes of the debtor.

(3) *In re Shah* 169 B.R. 17, 21 (Bkrtcy.E.D.N.Y. 1994), the bankruptcy court held that "a false oath respecting worthless assets can constitute a material omission. . ."

In the instant case, however, Petitioner suggests it is not in the realm of possibility that the statements in Count I of the indictment could ever be "material." Those statements are:

> "she had been diagnosed with multiple sclerosis, that in the past five years she had been bedridden and unable to control her bowels and bladder, that she had lost the use of her legs, that her vocal cords were useless and she had difficulty speaking. . ."

These unrelated statements have no connection whatsoever with the bankruptcy issues and should be deemed immaterial.

In an indictment, omission of an essential element of a crime is more important. The Federal Rule of Criminal Procedure 7(c)(1) requires that all elements of an offense be included. Failure to include all elements deprives the accused of their Sixth Amendment right being of knowing what the charges are so they can defend their

innocence. If Petitioner had known the element of "materiality" was a requirement as set forth in *United States v. Yagow*, 953 F.2d 427 *cert.den.* 506 U.S. 833 (1992), there would have been no plea bargain and no conviction in this case.

An immaterial statement made in a bankruptcy case does not constitute any crime.

While this Court in the case of *Neder v. United States* 527 U.S. 1 (1999) has made clear that "materiality" is an essential element under mail fraud, wire fraud and bank fraud statutes, 18 U.S.C. §§1341, 1342 and 1344, the "materiality" question concerning bankruptcy fraud statutes has not yet been addressed.

There are differences between the bankruptcy fraud statutes and the mail fraud, wire fraud and bank fraud statutes. The major difference is that the bankruptcy statutes contain the wording "under penalty of perjury" more closely aligning bankruptcy fraud statutes with the perjury statute 18 U.S.C. §1621. Unlike bankruptcy fraud statutes, mail fraud, wire fraud and bank fraud statutes, the perjury statute contains the "materiality" wording on it's face. But, as Chief Justice Rehnquist eloquently articulated a two-part analysis concerning the "materiality" element.

First, the Chief Justice looked at the statute to determine if "materiality" is included in the text of the statute under *United States v. Wells* 519 U.S. 482 (1997).

Second, the Chief Justice concluded that the inquiry does not end with the answer to that question. Chief Justice Rehnquist stated that "'[w]here Congress uses terms that have accumulated settled meaning under . . .the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning to these terms.'" *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) (quoting *Community for Creative*

*on-Violence v. Reid*, 490 U.S. 730, 739 (1989)); see *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense").

*Neder* contends that "defraud" is just such a term, and that Congress implicitly incorporated its common-law meaning, including its requirement of materiality into the [banking, mail and wire fraud] statutes Likewise, 18 U.S.C. §152(3) does not have the actual word "materiality" in it but the Courts have nevertheless required the element in most jurisdictions.[6] To complete the discussion of the "materiality" element in criminal statutes which do not expressly contain that word, Petitioner prays this Petition will be granted.

*2. Insufficient Indictment*

A District Court lacks subject matter jurisdiction if the Indictment is found to be insufficient. A criminal conviction must be vacated if it is determined that the indictment does not contain all of the elements of the offense. *United States v. Gayle*, 967 F.2d 483, 485 (11th Cir. 1992)(en banc); *United States v. Brown*, 995 F.2d 1493, 1505 (10th Cir. 1993). This requirement serves two fundamental functions:

First, it informs the defendant of the nature and cause of the accusation as required by the Sixth Amendment of The Constitution.

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6 The Restatement instructs that a matter is material if: "(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it." Restatement (Second) of Torts Sect. 538 (1976).

Second, it fulfills the Fifth Amendment's indictment requirement, ensuring that a grand jury only return an indictment when it finds probable cause to support all the necessary elements of the crime. *Gayle,* 967 F.2d at 485; see also *United States v. Hooker*, 841 F.2d 1225, 1230 (4th Cir. 1988)("The requirement of notice derives from the defendant's Sixth Amendment right to be informed of the nature and cause of the accusation. . . [The requirement of the] inclusion of all elements. . .derives from the Fifth Amendment, which requires that the grand jury have considered and found all elements to be present."); *United States v. Radetsky*, 535 F.2d 556, 562 (9th Cir. 1975)(holding that a sufficient indictment "is of paramount importance" and "required. . .to avoid [a] conviction on facts not found, or perhaps not even presented to, the grand jury that indicted the [defendant]"), *cert. denied,* 429 U.S. 820](1976), overruled in part on other grounds, *United States v. Daily*, 921 F.2d 994, 1004 & n.11(10th Cir.1990); U.S. Const. amend. V("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.");U.S. Const .amend. VI ("In all criminal prosecutions, the accused shall enjoy the right. . .to be informed of the nature and cause of the accusation.").

Narrowing the inquiry to the Fifth Amendment, it is not enough that the grand jury concludes that the defendant should be prosecuted for violating a particular statute; rather, the indictment must also allege every element of the offense. Only in this way is any assurance furnished that the grand jury found probable cause to believe that the defendant in fact committed acts constituting the offense in question. *United States v. Deisch,* 20 F.3d 139, 145-46 (5th Cir. 1994).

To be sufficient, an indictment must allege each material element of the offense; if it does not, it fails to charge that offense.

This requirement stems from one of the central purposes of an indictment: to ensure that the grand jury finds probable cause that the defendant has committed each element of the offense, hence justifying a trial, as required by the Fifth Amendment. *United States v. Cabrera-Teran,* 168 F.3d 141, 143 (5th Cir. 1999)(*emphasis added*). The omission of an element is "such a critical omission" that the Federal Rules of Criminal Procedure require it to "be noted by an appellate court *sua sponte*." *Brown*, 995 F.2d at 1504 (citing *United States v. Meacham*, 626 F.2d 503, 509 (5th Cir. 1980)(stating that the language of Fed.R.Crim.P.12(b)(2) requires that failure of indictment to charge an offense be noticed by district courts and appellate courts *sua sponte*)); see also *United States v. Shoup,* 608 F.2d 950, 960 (3rd Cir. 1979)(stating the general rule that courts must notice an indictment's defect in failing to charge a federal offense as jurisdictional).

In the instant case, the Grand Jury failed to include the essential element of "materiality" in the indictment. As such, Petitioner suggests the Indictment fails and should be vacated.

3. *The Conviction and Sentence.*

The appeals court opinion violates congressional intent and plain statutory wording concerning the conviction and sentence. The 15 ½ months detention plus 5 months pretrial release plus 2 years Supervised Release Petitioner is enduring for making statements about harmless medical problems, exceeds Sentencing Guidelines and violates congressional intent.

To support it's position, the appeals court cites U.S. Supreme Court case *United States v. Johnson* 529 U.S. 53 (2000). In *Johnson*, this Court describes Congressional intent concerning Supervised Release: "to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration. 18 U.S.C. §3553(a)(2)(D); United States

Sentencing Commission, Guidelines Manual §§5D1.3(c), (d), (e)(Nov. 1998); see also S.Rep. No. 98-225, p. 124 (1983) declaring that

> "the primary goal [of supervised release] is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release."

After never having been arrested or having any criminal history whatever for the first 52 years of Petitioner's life; after being on pretrial release for 5 months and being full-time employed for 4 months at the time of sentencing, Petitioner is clearly not a candidate for Supervised Release, even if it were legal, which under the plain wording of 18 U.S.C. §3624(e), it is not. Petitioner was never "imprisoned" nor in custody of Bureau of Prisons which are requirements for imposition of Supervised Release.

In the case of *U.S. v. Morales-Alejo* 193 F.3d at page 1105, the *Morales-Alejo* Court stated that:

". . .Congress uses the terms "imprisonment" and "detention" very different in federal criminal statutes. The term "imprisonment" consistently is used to refer to a penalty or sentence. See e.g. 18 U.S.C. §3559 (using the term imprisonment as meaning sentence after conviction); 18 U.S.C. §3581 (same); 18 U.S.C. §4101(b)(referring to imprisonment in the context of transfers to foreign contries and defining imprisonment as "a penalty imposed by a court under which the individual is confined to an institution").

"In contrast, the term 'detention' is used to describe a mechanism to insure a defendant's appearance and safety of the community. See, e.g., 18 U.S.C. §3142(c) *U.S. v. Salerno* 481 U.S. 739, 748 (1987)(characterizing the statutes authorizing pretrial

detention as regulatory in nature)."

There was no legal or factual reason why Petitioner was given the maximum 6 month imprisonment sentence nor why Petitioner was given a term of Supervised Release. And, as of now, no credit has been given for 9 ½ months of pretrial detainment.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARILYN M. MOSS

*Petitioner*

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 00-3917
99-00037-01-CR-W-4
UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE
*v.*
MARILYN M. MOSS, DEFENDANT-APPELLANT

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Appeal from the United States District Court
For the District of Western Missouri
Gary A. Fenner, District Judge, Presiding

Argued and Submitted
June 1, 2001 St. Louis, Missouri

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**ORDER**

Before: MORRIS SHEPPARD ARNOLD,
RICHARD S. ARNOLD, AND FAGG,
Circuit Judges.

* * * * *

The Order filed October 1, 2001 is as follows: The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

## OPINION

Before: MORRIS SHEPPARD ARNOLD, RICHARD S. ARNOLD, and FAGG, Circuit Judges.

PER CURIAM:

Marilyn Moss appeals *pro se* from her conviction, entered upon a guilty plea, for knowingly making a false statement in a bankruptcy proceeding, in violation of 18 U.S.C. §152. She was sentenced to six months' imprisonment to be followed by two years' supervised release. Ms. Moss received credit towards the entire prison term in light of the 15 ½ months she spent in pretrial detention. For reversal, Ms. Moss claims that she would not have pleaded guilty but for counsel's ineffectiveness in failing to advise her that (1) the indictment did not set forth an offense because it did not allege that the false statement was material; (2) she should have received credit for time served towards the term of supervised release; (3) the government has been guilty of misconduct surrounding her arrest, warranting dismissal of the indictment; and (4) the conditions of her supervised release that she not possess a firearm, and that she not file frivolous papers in her bankruptcy action, are illegal. She also presents these as free-standing claims. We affirm.

### I.

Ms. Moss was arrested in Kansas by Kansas police officers on February 24, 1999, at the request of an FBI agent. On February 25, a federal criminal complaint was filed against her in the Western District of Missouri charging her with bankruptcy fraud. On March 2, 1999, she was charged in a two-count federal indictment with knowingly and fraudulently making false statements under penalty of perjury in a Chapter 7 bankruptcy case she had filed in the Western District of Missouri. Count I alleged that in a pleading seeking to

postpone the creditors' meeting, she had misrepresented that she was extremely ill and could not attend the meeting. Count II alleged that she had subsequently filed a false declaration of her own death. Also on March 2, following a hearing, Ms. Moss was detained as a flight risk.

On April 16, 1999, Ms. Moss attorney filed a motion for a judicial determination of Ms. Moss' competency to stand trial. On July 21, 1999, the District Court found that Ms. Moss was not competent to stand trial, and she was detained in the federal medical center until May 25, 2000, when the District Court found her competent. On June 8, 2000, Ms. Moss pleaded guilty of Count I of the indictment, the government dismissed the second count, and the District Court released her on bond.

On November 8, 2000, the District Court sentenced Ms. Moss to six months, the maximum term of imprisonment under the Sentencing Guidelines, with credit for the 15 ½ months already served, to be followed by two years supervised release.

**II.**

In pleading guilty, a criminal defendant admits the factual allegations in the indictment and waives all nonjurisdictional defects. *O'Leary v. United States*, 856 F.2d 1142, 1143 (8th Cir. 1988). A claim that the indictment on its face fails to state an offense is a "jurisdictional" claim that is not waived. *Id.* Here, however, even if materiality of the false statement is an element of 18 U.S.C. §152, Count I of the indictment alleges sufficient facts to satisfy this element. See *United States v. Yagow*, 953 F.2d 427, 433 (8th Cir.) (Materiality of misrepresentation for purposes of bankruptcy fraud is not limited to statements that relate to the assets of the bankrupt estate), *cert. denied*, 506 U.S. 833 (1992).

Ms. Moss' claim of government misconduct surrounding her arrest was waived by her guilty plea. Her claims concerning her conditions of her supervised release are without merit. We also conclude that her claim that she is entitled to credit toward her two-year term of supervised release for the time she served in pretrial detention is without merit. See *United States v. Johnson*, 529 U.S. 53. 57 (2000)("supervised release does not run while an individual remains in the custody of the Bureau of Prisons.").

Accordingly, we affirm the conviction and sentence.

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | No. 99-00037-01-CR-W-4 |
| Plaintiff, | ) | COUNTS ONE AND TWO: |
| | ) | 18 U.S.C. §152 |
| v. | ) | Class D Felony |
| MARILYN M. MOSS, | ) | NMT 5 years, $250,000 fine |
| a/k/a Marilyn M. Bryant, | ) | NMT 3 years supervised |
| a/k/a Marilyn W. Bryant, | ) | $100 Special Assessment |
| [DOB: 02/25/47] | ) | Each Count |
| Defendant. | ) | |

INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT ONE

On or about August 27, 1998, at Kansas City, in the Western District of Missouri, defendant MARILYN M. MOSS, a/k/a Marilyn M. Bryant and a/k/a Margaret W. Bryant, in the case filed in the United States Bankruptcy Court for the Western District of Missouri under Title 11 of the United States Code and styled, "In re Marilyn M. Moss, Debtor,". Bankruptcy Case No. 98-43272-W-KMS, did knowingly and fraudulently make false declarations and statements under penalty of perjury in a pleading captioned 'Disabled Debtor Ex Parte Application for 30 day Continuance of Creditors Meeting and Accommodation under Americans with Disabilities Act," including a "Declaration of Dr. Joseph Lindsay," in that defendant MARILYN M. MOSS knowingly and fraudulently stated and caused to be stated in such pleading that she had been diagnosed with multiple sclerosis, that

in the past five years she had been bedridden and unable to control her bowels and bladder, that she had lost the use of her legs, that her vocal cords were useless and she had difficulty speaking, whereas defendant knew these statements were false, and further that the "Declaration of Dr. Joseph Lindsay" had been signed by a "Dr. Joseph Lindsay," whereas defendant knew that no such person had signed this Declaration and further that the Proof of Service for such pleading had been signed by a "Karen Anderson" whose business address was "2210 South Main, Kansas City, Missouri," whereas defendant knew that no such person at such address had signed the Proof of Service; all in violation of Title 18, United States Code, Section 152(3).

COUNT TWO

On or about November 23, 1998, at Kansas City, in the Western Distrit of Missouri, defendant MARILYN M. MOSS, a/k/a Marilyn M. Bryant and a/k/a/ Marilyn W. Bryant, in the case filed in the UnitedStates Bankruptcy Court for the Western District of Missouri under Title 11 of the United States Code and Styled, "In re Marilyn M. Mos, Debtor," Bankruptcy Case No. 98-43272-W-KMS, did knowingly and fraudulently make false declarations and statements under penalty of perjury in a pleading captioned, "Notification of Death of Debtor Marilyn Moss" and "Declaration of Jonathan Lindstrom," in that defendant MARILYN M. MOSS knowingly and fraudulently stated and caused to be stated in such pleading that on November 15, 1998, Marilyn Moss had died of a brain aneurysm, and that the few assets left in the estate had to be used to pay for her coffin and tombstone, whereas defendant knew that she had not died, and further that the Declaration had been signed by Jonathan Lindstrom as administrator of the Last Will and Testament of Marilyn Moss, whereas defenant knew that no such person had signed the Declaration and that there was no administrator of her Last Will and

Testament; all in violation of Title 18, United States Code, Section 152(3).

A TRUE BILL

/s/ Danita K. Hodges

Foreperson of the Grand Jury

/s/ J. Daniel Stewart

J. Daniel Stewart #32314

Assistant United States Attorney